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No. 08-409

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WALTER RALPH MABRY AND
ANTHONY MICHAEL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

JAMES K. ROBINSON*
ERIN F. LEWIS
CADWALADER, WICKERSHAM & TAFT LLP
1201 F Street, NW
Washington, DC 20004
(202) 862-2200

Counsel for Walter Ralph Mabry

ARTHUR J. WEISS
30445 Northwestern Highway
Suite 330
Farmington Hills, MI 48334
(248) 855-5888

Counsel for Anthony Michael

*Counsel of Record

February 9, 2009

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Without contesting that the interpretation of the settlement exception in 29 U.S.C. § 186(c)(2) has far-reaching civil and criminal consequences for thousands of employers and union officials, Respondent ignores the plain meaning of the statute and turns a blind eye toward the Sixth Circuit panel majority's failure to interpret a criminal prohibition in accordance with this Court's most recent directives regarding strict construction, the rule of lenity and the fundamental right of a criminal defendant to have his

guilt determined not by a court of appeals, but by a jury of his peers.

This Court's discretionary review is appropriate where, as here, a court of appeals has "decided an important question of federal law that has not been, but should be, settled by this Court, [and] has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). Moreover, given the panel majority's disregard of this Court's decisions in *Watson* and *Santos*, and the absence of pre-submission briefing below on the jury trial issue, there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and an exercise of this Court's power to grant, vacate and remand is therefore appropriate. *See Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

ARGUMENT

I. The interpretation of the settlement exception is an important issue that has not been, but should be, settled by this Court.

A. The United States does not deny that the statute and its interpretation will impact thousands of union officials and employers.

As the brief of amici curiae Construction Association of Michigan ("CAM") and Michigan Conveyor Manufacturers Association ("MCMA") demonstrates, the panel majority's ruling "clearly causes confusion for Associations such as CAM and MCMA and its union employers in regards to settling bona fide disputes with union officials." Am. Br. 8. Amici further

explain that the *Mabry* decision creates "confusion and uncertainty with respect to the Department of Labor's filing requirements for LM-10 and LM-30 forms" for reporting the transfer of "things of value." Am. Br. 8. If allowed to stand, the Sixth Circuit's decision will impair employers' and labor officials' ability to negotiate various business transactions without incurring excessive legal and other financial costs. This will only undermine many industries that already are in financial despair. The importance of the issues in labor relations and in the administration of the Taft-Hartley Act strongly support a grant of certiorari in this case. *See, e.g., National Labor Relations Board* v. *Local Union No. 1229, Int'l Brotherhood of Electrical Workers*, 346 U.S. 464, 471 (1953) (granting certiorari because of the importance to the administration of the Taft-Hartley Act); *United States* v. *Ryan*, 350 U.S. 299, 300 (1956) (granting certiorari because of the importance of § 302 in the LMRA); *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278 (1956); *National Labor Relations Board* v. *United Steelworkers of America*, 357 U.S. 357, 359 (1958); *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964); *Sheet Metal Workers' Int'l Association* v. *Lynn*, 488 U.S. 347, 349 (1989).

B. Without clarification from this Court, union officials and employers attempting to comply with the civil and criminal laws surrounding transactions between them have no clear guidance on how to do so.

A law-abiding employer or union official looking for compliance guidance would find three separate explications into the settlement exception. First, the gov-

ernment below contended, and the district court on rehearing agreed, that a payment by an employer to a union official falls within the "settlement exception" only when the payment represents the settlement of an actual controversy presented to a court or arbitrator. Br. Opp. 7. Respondent claims to find support for this view in the "text and legislative history" of Section 186(c)(2), but only discusses the legislative history and "purpose" of the underlying prohibition, likely because it is impossible to find support in the text of § 186(c)(2) itself.[1] Br. Opp. 7-8. The court of appeals rejected this definition of the settlement exception, defining the second interpretation: that settlements must bear some level of "structure or formality" to fall within § 186(c)(2) and that the provision cannot "be construed so broadly as to include the informal resolution of the Nelson Mill payment dispute." Br. Opp. 8-9. Respondent finds support for this proposition in the doctrine of *ejusdem generis*. Br. Opp. 9. Third, the DOL's website provides that the settlement exception applies to payments made "in satisfaction of a judgment or arbitration award," as well as payments "to settle a bona fide claim, in the absence of fraud or duress." Br. Opp. 10.

Respondent skirts the issue of which interpretation is correct, noting only that "petitioners could not prevail under either the government's or the court of appeals' interpretation[.]" Br. Opp. 9. Respondent avoids

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[1] In response to a request by Petitioner Mabry that the Solicitor General's office confess error, the solicitor general's office stated that the district court's opinion contained "unnecessarily broader language . . . to the effect that the settlement exception requires a settlement reached 'through the adjudicative process, meaning by a judgment of a court or an arbitrator's award.'" Appx. 2a.

entirely the merits of the DOL's construction, declaring that "[c]ontrary to petitioner's contention, the decision below is not *necessarily* inconsistent with the Department of Labor's guidance."[2] Br. Opp. 10 (emphasis added). This is especially troubling because even those union officials and employers who specifically seek out, and comply with, the DOL's guidance could face indictment if the settlement they reach lacks the unspecified degree of structure or formality required by the Sixth Circuit opinion, or does not involve a settlement in the context of pending litigation or arbitration, as the government insists must occur to trigger the exception.

II. The panel majority's failure to consider strict construction and the rule of lenity, in the face of *Watson* and *Santos*, suggests that "the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration."

The Sixth Circuit panel majority ignored this Court's recent directive that the starting point for construing an undefined term is "language as we normally speak it." *Watson* v. *United States*, 128 S.Ct. 579, 583 (2008). The plain meaning of the settlement exception extends its protection broadly to all "informal settlements of informal disputes . . . so long as such settlements are made in the absence of fraud

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[2] Respondent's second argument regarding the DOL guidance is a red herring. Petitioners never contended that the DOL is responsible for administering the criminal provisions in § 186. Petitioners explained that in connection with reporting requirements—which are administered by the DOL—the DOL offers its interpretation of § 186 to identify payments that need not be reported, and, obviously, therefore are not criminal.

or duress," as was found by the panel dissent. Pet. Appx. 19a-20a. Yet, the panel majority never addressed the plain language of § 186(c)(2), and instead focused on doctrines of statutory construction that are applicable only when the statutory language is unclear.

Respondent attempts to distinguish *Watson* by contending that the court of appeals' interpretation is "consistent with ordinary meaning and the conventions of English." Br. Opp. 13. In analyzing § 186(c)(2), Respondent does not begin with the statute's plain language, as mandated by *Watson*, but argues instead that the "proper interpretation of a statute takes into account not only the bare meaning of the critical word or phrase but also its placement and purpose in the statutory scheme." Br. Opp. 9. It then relies on *ejusdem generis*—not plain meaning—to support the panel majority's conclusion that some level of structure or formality is required. Br. Opp. 9. Respondent cites *Arroyo* v. *United States* for the proposition that "penal laws . . . are not to be construed so strictly as to defeat the obvious intention of the legislature." 359 U.S. 419, 424 (1959). In *Arroyo*, however, this Court applied the statute's plain meaning in favor of a defendant charged with violating the LMRA—rather than relying on purported "legislative intent" to condemn him. 359 U.S. at 424-425.

The Sixth Circuit similarly did not consider this Court's lenity teachings in *United States* v. *Santos*, 128 S.Ct. 2020 (2008), decided after the panel majority's opinion was issued. Contrary to Respondent's assertion, lenity does not apply "only where there is a grievous ambiguity or uncertainty in the statute, such that after seizing everything from which aid can

be derived, the Court can make no more than a guess as to what Congress intended." Br. Opp. 14. Rather, lenity simply requires "ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Santos*, 128 S.Ct. at 2025. Ambiguity means that "[u]nder either of the word's ordinary definitions, all provisions . . . are coherent; no provisions are redundant; and the statute is not rendered utterly absurd." *Id.* In such an instance, the "tie must go to the defendant." *Id.* The panel majority concluded that § 186(c)(2) was ambiguous, both before and after applying standard canons of statutory interpretation. Pet. Appx. 6a. While Petitioners believe that the plain meaning of the statute compels their conclusion, the fact that the government, the district court's two opinions, the court of appeals majority and dissent, and the Department of Labor's guidance interpret the statute in conflicting ways suggests that there is confusion. Respondent never asserts that the interpretation propounded by Petitioners is not consistent with § 186(c)(2)'s plain language, and contends only that the panel majority's position is "consistent" when viewed through the lens of *ejusdem generis*. Further speculation regarding a "dubious congressional intent" is impermissible. *Santos*, 128 S.Ct. at 2026. Here, as in *Santos*, the tie must go to the defendants.

III. Respondent, like the Court of Appeals, draws factual conclusions based on the incomplete trial record and argues that the Nelson Mill settlement would not satisfy any of the available standards.

Rather than shedding light on which interpretation of § 186(c)(2) the United States believes is accurate, Respondent claims that "this case would not provide

a suitable vehicle for review of that purported conflict . . . because petitioners' 'claim' against Nelson Mill was not 'bona fide . . .' Br. Opp. 11. Petitioners have argued throughout the case that this settlement was the result of a bona fide dispute. More importantly, in making this contention, Respondent, like the Court of Appeals, disregards the fact that Petitioners were denied a jury determination of whether their conduct satisfied the settlement exception.

The Constitution "protects every criminal defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *United States* v. *Booker*, 543 U.S. 220, 230 (2005). Moreover, the Sixth Amendment requires that criminal convictions rest upon a jury determination that the defendant is guilty of every element of the crime, beyond a reasonable doubt. *Id.*, *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995). A properly instructed jury, not a Court of Appeals, is the appropriate body to determine whether, as a factual matter, Petitioners' settlement with Nelson Mill was protected by the settlement exception. It was improper for the courts below to deprive the defendants of a jury trial on factual issues like whether the Nelson Mill settlement was the settlement of a bona fide claim, or even whether there was sufficient "structure or formality" in the settlement if that is, in fact, required by the statute.

Respondent attempts to relieve the government of its responsibility by claiming that a defendant bears the burden for proving that an affirmative defense applies. Br. Opp. 15, citing *Dixon* v. *United States*, 548 U.S. 1, 13 (2006). Petitioners contend that the settlement exception is more akin to an element of

the crime than an affirmative defense.[3] Regardless, the opinion in *Dixon*, based on the unique defense of duress,[4] is inapposite here. The defendant in *Dixon* received a jury instruction on her proffered theory of defense; she simply contended that the burden of proof had not been allocated properly. 548 U.S. at 4-5. By contrast, the district judge in Petitioners' trial removed the theory of defense from the case before the trial even started, on a ground that the court of appeals has now rejected. Even if Petitioners had the burden of proving to a properly instructed jury that the defense applied, Petitioners' jury never had a chance to consider whether Petitioners' conduct was protected by the settlement exception because the trial judge believed that the only covered settlements

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[3] As a matter of the language employed in the statute, the "exceptions" in §§ 186(c)(1)-(3) involve payments that are always legal and cannot be treated as mere "exceptions" or "affirmative defenses" to otherwise illegal conduct. *See United States* v. *Phillips*, 19 F.3d 1565, 1579 (11th Cir. 1994) ("Section 186(c) contains two types of exceptions. The first three exceptions, sections 186(c)(1)-(3), describe payments that do not have the potential for corrupting the labor movement.") Instead, these "exceptions" are "so incorporated with the language defining the offence (sic)" that they are necessary to the definition of the prohibition itself. *See United States* v. *Cook*, 84 U.S. 168, 173 (1872).

[4] Common law has long required that a defendant bear the burden of proving the existence of duress. *Dixon*, 541 U.S. at 13. For other defenses, once the defendant has "go[ne] forward with sufficient evidence to raise the exception as an issue," the prosecution must prove the inapplicability of the defense beyond a reasonable doubt. *United States* v. *Grace*, 455 F. Supp. 2d 1133, 1138 (D. Mont. 2006); *United States* v. *Smith*, 981 F.2d 887, 891-892 (6th Cir. 1992); *United States* v. *Freter*, 31 F.3d 783, 789 n. 6 (9th Cir. 1994); *United States* v. *Guess*, 629 F.2d 573, 576-577 (9th Cir. 1980).

were those achieved through litigation or arbitration—neither of which was present in the context of the Mabry/Nelson Mill dispute.[5]

The panel majority's decision, in effect, directed a verdict for the prosecution, based on what it was able to glean from an incomplete trial record. The United States, in its brief in opposition, seeks to do the same thing, albeit on a different factual theory: assert that, factually, the dispute was not sufficiently "bona fide" to satisfy the settlement exception. Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the prosecution, no matter how overwhelming the evidence. *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993); *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 408 (1947). Indeed, "absent voluntary waiver of the jury right,

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[5] In *Mathews* v. *United States*, this Court reasoned that a defendant is entitled to a jury instruction "when there exists evidence sufficient for a reasonable jury to find in his favor." 485 U.S. 58, 63 (1988). Without further guidance, however, the circuits are conflicted regarding when the evidence is "sufficient." Some circuits conclude that trial courts are not gatekeepers. *See, e.g., United States* v. *Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995); *Perez* v. *United States*, 297 F.2d 12, 15-16 (5th Cir. 1961); *United States* v. *Pedroza*, 750 F.2d 187, 204-205 (2d Cir. 1984); *United States* v. *Rodriguez*, 858 F.2d 809, 812, 814 (1st Cir. 1988). Other circuits "respect the trial judge's role as gatekeeper[.]" *United States* v. *Al-Rekabi*, 454 F.3d 1113, 1122-1123 (10th Cir. 2006) Others hold that the *Mathews* test requires a "low evidentiary threshold" of "some foundation in the evidence, and something more than a mere scintilla." *United States* v. *Johnson*, 459 F.3d 990, 994 (9th Cir. 2006), cert. denied, 127 S.Ct. 1486 (2007). Regardless of the correct standard, Petitioners' trial judge could not have applied it because he interpreted the settlement exception in a manner that Respondent concedes was inappropriate.

the Constitution does not trust judges to make determinations of criminal guilt." *Neder* v. *United States*, 527 U.S. 1, 32 (1999) (Scalia, J. dissenting).[6] As this Court held in *Bollenbach* v. *United States*, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in federal court." 326 U.S. 607, 614 (1946). An exercise of this Court's discretionary review is necessary to enforce the Sixth Amendment right to trial by jury.

CONCLUSION

With respect, since the district judge, the majority and dissenting judges of the Sixth Circuit, the United States Department of Labor, the Solicitor General and the former Assistant Attorney General for the Criminal Division (albeit one of the defense lawyers in this case) all reached conflicting interpretations of § 186(c)(2), the employers and labor officials covered by the Taft-Hartley Act do not stand a chance. Surely the language of the settlement exception, if not clear under *Watson*, is ambiguous and warrants analysis under *Santos*. American notions of due process and fair notice of malum prohibitum criminality require no less than respect for the defendants' right to a jury determination of the facts, with a

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[6] Petitioners' case differs sharply from the "harmless error" result in *Neder*. In contrast to *Neder*, in which the defendant underreported $5 million on his tax returns, failed to contest materiality at trial and did not suggest that he would introduce any evidence bearing upon that issue, Petitioners' effort to raise the settlement defense was thwarted because the trial judge found as a matter of law that Petitioners were not permitted to raise the defense, introduce evidence or have the matter presented to the jury with a proper jury instruction.

proper instruction concerning the settlement exception. For the reasons stated herein and in their initial petition, Petitioners request that this Court grant a writ of certiorari. In the alternative, Petitioners request that the Court grant certiorari, vacate the lower court's holding and remand for reconsideration in light of *Watson*, *Santos*, *Sullivan* and *Booker*.

Respectfully submitted,

JAMES K. ROBINSON*
ERIN F. LEWIS
CADWALADER, WICKERSHAM
& TAFT LLP
1201 F Street, NW
Washington, DC 20004
(202) 862-2200

Counsel for Walter Ralph Mabry

ARTHUR J. WEISS
30445 Northwestern Highway
Suite 330
Farmington Hills, MI 48334
(248) 855-5888

Counsel for Anthony Michael

*Counsel of Record

February 9, 2009

APPENDIX

APPENDIX

[Logo]

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

October 2, 2007

James K. Robinson, Esq.
Cadwalader, Wickersham & Taft LLP
1201 F Street, N.W.
Washington, D.C. 20004

Re: United States v. Mabry, No. 06-2324 (6th Cir.)

Dear Mr. Robinson:

This letter is in response to your letter dated July 23, 2007, regarding United States v. Mabry, No. 06-2324, which is pending on appeal before the U.S. Court of Appeals for the Sixth Circuit. You have asked the Department to confess error with respect to the district court's interpretation of 29 U.S.C. § 186(c)(2), the settlement exception to the prohibition against a labor official seeking or receiving a "thing of value" from an employer under the Taft-Hartley Act.

We have carefully reviewed the proposed construction of Section 186(c)(2) set forth in your letter and the brief you filed in the Sixth Circuit. We believe that the better reading of the statute is that the settlement exception in Section 186(c)(2) requires that "the payment must have been made in settlement of an actual controversy that was filed and pending in court, or presented to an arbitrator or impartial adjudicator prior to settlement," as the United States Attorney's office argued in its brief (Br. 29-30) filed in the Sixth Circuit. No binding authority, or evidence of legislative intent, contradicts that interpretation, and it is both consistent with the text of the statute

and Congress's purpose in enacting the settlement exception. As such, notwithstanding some unnecessarily broader language in the district court's opinion to the effect that the settlement exception requires a settlement reached "through the adjudicative process, meaning by a judgment of a court or an arbitrator's award," Op. 13, we believe that the court of appeals should resolve the issue based on the parties' briefs and an adversary presentation. Accordingly, we decline to confess error in this case.

Thank you for bringing this issue to the Department's attention.

Sincerely,

/s/ Michael R. Dreeben
Michael R. Dreeben
Deputy Solicitor General

cc: Christopher P. Yates, Esq.
Counsel for Appellant Anthony Michael